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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CLEM ABRAMS, et al., Plaintiffs and Respondents. v. THE CITY OF SAN DIEGO, Defendant;	D029343 (Super. Ct. No. 655468)
MESA SHOPPING CENTER EAST, Real Party in Interest and Appellant.	

(Filed Mar. 6, 2000)

APPEAL from an order of the Superior Court of San Diego County, Wayne L. Peterson, Judge. Affirmed.

Mesa Shopping Center East (MSCE) appeals a grant of a petition for writ of mandamus in favor of Clem Abrams and John Bohannon (together Abrams). MSCE claims the trial court erroneously granted the writ because it improperly determined that the public improvement cost reimbursement lien the City of San Diego (the City) imposed on Abrams's property was disproportional to the benefit Abrams's property received from the public improvements. MSCE also claims Abrams waived his right to contest the formula used to calculate the amount of the lien. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1987, the San Diego City Council approved MSCE's development of a 23.8-acre site for residential and commercial purposes. The development's approval was conditioned on the construction of public improvements, including a four-lane major street and water and sewer facilities. The City established a cost reimbursement district for the sharing of costs of the public improvements by the benefited property owners.

Abrams owned property adjacent to MSCE's property significantly impacted by MSCE's development; the required street improvements (Westview Parkway and Galvin Avenue) included a portion of Abram's property and divided it into three non-contiguous parcels.

In January 1989 the city attorney initiated the formation of the cost reimbursement district under which MSCE would be reimbursed for the costs of the public improvements by the benefiting landowners if those owners developed their land within 20 years. In April the City authorized the city manager to formulate the share each benefiting landowner would pay on development of its land.

In early 1990 the estimated cost of the public improvements required in connection with the development of MSCE's property was $2,830,809. MSCE would absorb $1,401,115 and the owners of the remaining benefited land would pay a designated share of the balance if they developed their land within 20 years. The share allocated to each benefited owner was secured by a cost reimbursement lien on the owner's land.

The original assessment to Abrams's property was $611,043 but was subsequently lowered to $570,948. The city council approved the cost reimbursement district on February 13, 1990, and a resolution of lien was filed the same day. Abrams did not challenge this resolution.

In July 1990 MSCE wrote to the City's Engineering and Development Department proposing that additional costs of $427,351 be charged to Abrams's property, increasing Abrams's total cost to $998,299. In September 1990 the city council adopted a resolution amending the cost reimbursement district. Abrams did not contest this increase.

In August 1990 the City filed a complaint in eminent domain against Abrams and other property owners to condemn the property to be used in the street improvements related to the MSCE development. The City also recorded a notice of lis pendens. On March 6, 1992, Abrams and the City entered into stipulation pursuant to which Abrams received $570,000 plus $71,358.40 in interest in "full, final, and just compensation . . . for the taking of said real property. . . . " The portion of Abram's property not taken by condemnation remained encumbered by the cost reimbursement lien.

In April 1992 the City informed Abrams of a new proposed amendment to the cost reimbursement district that would increase Abrams's obligation to $1,543,550.18. The calculation of the additional cost was based on the "Eight Owners" agreement, which set the percentage of responsibility for certain improvements. Pursuant to the Eight Owners agreement, MSCE and Abrams would share, 75 percent and 25 percent respectively, the cost of

construction of the street improvements between Mira Mesa Boulevard and Galvin Road.

In June 1992 the City held a hearing on the increased cost and its allocation among the property owners. Abrams opposed the proposed increase by letter and at the hearing. At the hearing, Abrams's attorney because of the substantial impact on Abrams's property sought a continuance to consult an engineer to make an alternative proposal, have an opportunity to negotiate with the other parties and prepare a more detailed case. Despite no objection from MSCE, the city council denied the request for a continuance. After Abrams's attorney spoke for approximately 15 minutes, the city council, with one dissenting vote, approved the additional reimbursement cost assessed against Abrams.

In August 1992 Abrams filed a complaint for declaratory and injunctive relief against the City. In August 1996 Abrams filed a second amended complaint for declaratory and injunctive relief, violation of section 1983 of title 42 of the United States Code, damages and a verified petition for writ of administrative mandamus. All causes of action were pleaded against the City as a defendant and the request for writ of mandamus was also pleaded against MSCE as real party in interest.

The court granted the writ and remanded the matter to the city council to "demonstrate a factually sustainable proportionality between the effects of the costs assessed through the Cost Reimbursement District and the exaction in the amended costs of $1.543 million assessed 6/23/92." In granting the writ, the court applied the tests in *Dolan* v. *City of Tigard* (1994) 512 U.S. 374 (*Dolan*) and *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 374 (*Nollan*)

and used a heightened standard of scrutiny because the local government imposed a special discretionary permit condition on development by an individual property owner, rather than an assessment on a broad class of property owners. In applying the substantial evidence test, the court found "no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was roughly proportional benefit to the parcel." MSCE appeals the grant of writ of mandamus.

II

DISCUSSION

A

Standard of Review

On judicial review of an administrative decision not involving or affecting a fundamental vested right, the trial court reviews the administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.* (1991) 228 Cal.App.3d 1548, 1556.) On appeal, the reviewing court also applies the substantial evidence test. (*Ibid.*)

However, if an administrative decision substantially affects a fundamental vested right, the independent judgment standard of review applies (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.*, *supra*, 228 Cal.App.3d at p. 1555); the trial court examines the administrative record for errors of law and exercises its independent judgment on the evidence. (*Ibid.*) On appeal,

the reviewing court can overturn the trial court's factual findings only if the evidence received by the trial court, including the administrative record, is insufficient as a matter of law to sustain the finding. (*Ibid.*)

Whether an administrative decision substantially affects a fundamental vested right is decided on a case-by-case basis (*301 Ocean Ave. Corp.* v. *Santa Monica Rent Control Bd.*, *supra*, 228 Cal.App.3d at p. 1556.) In deciding whether the right is fundamental and vested, the court must decide whether the affected right is "of sufficient significance to preclude its extinction or abridgment by a body lacking *judicial* power. [Citation.]" (*Frink* v. *Prod* (1982) 31 Cal.3d 166, 176, original italics.) Courts are less likely to find a vested fundamental right if the interest to be preserved is strictly economic. (*Goat Hill Tavern* v. *City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1526.)

The right to control the use of one's own property is one of the most fundamental rights in this country. (See *Dolan*, *supra*, 512 U.S. at p. 393 [the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [Citation.]"].) However, the cost reimbursement lien imposed on Abrams's property does not limit his ability to use the property, but rather impacts his economic interests. Thus, the trial court properly applied the substantial evidence standard for review of the administrative record, as do we on appeal.

B

Rough Proportionality

MSCE argues that the trial court should not have applied the tests in *Dolan*, *supra*, 512 U.S. 374 and

Nollan, supra, 483 U.S. 825 and instead should have applied the test articulated in *White* v. *County of San Diego* (1980) 26 Cal.3d 897.

In *Nollan* and *Dolan* the United States Supreme Court addressed the issue of conditioning development permits on concessions by the property owner. In *Nollan*, residential property owners challenged a California Coastal Commission requirement that they grant an easement for public access across their beachfront property as a condition to approval of a building permit to construct a larger house. (*Nollan, supra,* 483 U.S. at p. 827.) The issue was whether the easement exaction furthered a legitimate state interest in public access to the beach. (*Id.* at pp. 836-837.) The Supreme Court assumed that the Coastal Commission's purposes were legitimate state interests but held there must be an essential nexus between the exaction and the asserted legitimate state interest. (*Id.* at p. 837-838.)

In *Dolan*, the court resolved "the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." (*Dolan, supra,* 512 U.S. at p. 377.) The court reiterated that an essential nexus must exist between the legitimate state interest and the permit condition and further held that the exactions demanded by the city must be roughly proportional to the impact of the proposed development. (*Id.* at pp. 386-391.)

Both *Dolan* and *Nollan* addressed situations in which the property owner was required to provide an easement or otherwise grant public access over its property in exchange for a development permit. In neither case was the property owner required to pay a fee in exchange for a

permit to develop the property. In 1996 the California Supreme Court addressed whether *Dolan* and *Nollan* apply to the exaction of a fee as a condition to issuing the development permit. (*Ehrlich* v. *City of Culver City* (1996) 12 Cal.4th 854, 859 (*Ehrlich*).) The court concluded that *Dolan/Nollan* applies to monetary exactions imposed as a condition to approving a land development request. (*Ibid.*) To charge a monetary sum in exchange for allowing development, the municipality or other government agency must prove that "both an 'essential nexus' or relationship between the permit condition and the public impact of the proposed development, and [] a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development" exist. (*Id.* at p. 860.)

Although *Ehrlich* was decided under the Mitigation Fee Act, Government Code section 66000 et seq., its reasoning applies here. If land development is conditioned on an act that exacts property or money, the exaction must have a rough proportionality to the benefit to the property.

White does not change this analysis. In *White*, the court determined whether special assessments on property sufficiently benefited the property to justify the assessment. The court stated that an assessment must be generally proportional to benefits. (*White* v. *County of San Diego*, *supra*, 26 Cal.3d at p. 905.) Although *White* was decided several years before *Nollan* and *Dolan*, it states an assessment against property must be generally proportional to the benefits to the property resulting from the assessment, which is [sic] accord with *Nollan/Dolan/Ehrlich*. (*White*, *supra*, 26 Cal.3d at p. 905.)

C

Substantial Evidence

In applying the substantial evidence test, the trial court found "no relevant evidence in the record of benefits to the parcel that a reasonable mind might accept as adequate to support the conclusion that there was roughly proportional benefit to the parcel." Substantial evidence supports the trial court's determination.

There is no evidence in the record that the city council considered proportionality when increasing the reimbursement fee against Abrams's property. Abrams's attorney spoke for 15 minutes after his request for continuance was denied. The record shows no determination by the city council that the additional assessment was roughly proportional to benefits purportedly received by Abrams, and the city council did not identify any proposed benefit. To impose a cost reimbursement lien on Abrams's property, the City must prove that an essential nexus exists between the assessment and the benefit of public improvement and that the amount of the assessment is roughly proportional to the benefit to the property of the street improvement. Because there is no evidence of proportionality, the trial court correctly determined that insubstantial evidence supported the action by the city council.

D

Waiver

MSCE also contends that Abrams waived the right to contest the additional amount of the cost reimbursement

lien by not earlier challenging the "formula" used to calculate it.

Government Code section 66499.37 provides the statute of limitations by which time a decision of an administrative agency concerning a subdivision must be taken. Unless challenged within 90 days following the date of the decision, "all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations." (Gov. Code, § 66499.37.) MSCE claims this section bars Abrams's action.

Government Code section 66499.37 does not bar the action. Abrams did not object to the amount of the original lien or the first increase of that lien. Thus, there was no reason before the last increase for Abrams to challenge the formula establishing the amount of the lien. Abrams was not required to challenge a lien amount to which he did not object. Abrams did timely challenge the amount of the lien he does contest. Finally, it appears that Abrams was charged in the latest increase for 75 percent to 100 percent of certain public improvements that were not even contemplated by the earlier lien amount determination.

E

Due Process

MSCE also argues that Abrams waived any right to argue that his due process rights were violated by the city council's refusal to grant a hearing continuance. Because Abrams obtained a writ of mandamus, the due process argument is moot and we do not address it.

F

Prejudice

Abrams argues MSCE has not shown it was prejudiced or aggrieved by the grant of writ of mandamus and therefore does not have standing to appeal. MSCE is a party of record and is aggrieved. MSCE was to absorb the public improvement costs not paid by other property owners. If Abrams's share of the costs is reduced, MSCE's share increases. Therefore, MSCE is aggrieved and has standing to appeal.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

/s/ McDonald
McDONALD, J.

WE CONCUR:

/s/ Work
WORK, Acting P.J.

/s/ Haller
HALLER, J.